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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1992

CENTURY CENTRE PARTNERS, LTD.,

Petitioner,

vs.

FDIC, MANAGER OF THE FSLIC RESOLUTION FUND,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WAS IT ERROR TO GRANT SUMMARY JUDGMENT ON THE BASIS THAT THE *D'OENCH DUHME* DOCTRINE APPLIES TO THE FSLIC RESOLUTION FUND DESPITE THE FACTS THAT (A) THE FSLIC RESOLUTION FUND IS NOT COVERED BY 12 U.S.C. §1823(e) AND (B) THE NOTE IN QUESTION IS NOT A NEGOTIABLE INSTRUMENT, AND THEREFORE, THE FSLIC RESOLUTION FUND CAN NOT BE A HOLDER-IN-DUE-COURSE?

II. WAS IT ERROR TO FAIL TO REMAND THIS PROCEEDING FOR THE PURPOSE OF ADDRESSING ADDITIONAL ISSUES REQUIRED TO PROPERLY RULE ON SUMMARY JUDGMENT?

LIST OF PARTIES

Petitioner: Century Centre Partners, Ltd. and ARP Century Centre, Inc.

Respondent: The FSLIC Resolution Fund later substituted as the FDIC, as Manager of the FSLIC Resolution Fund

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Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Century Centre Partners, Ltd. ("Century Centre"), respectfully prays that a writ of certiorari issue to review the judgment and amended opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 8, 1993.

OPINIONS BELOW

This is an appeal from summary judgment in a bankruptcy Adversary Proceeding. The opinion of the Court of Appeals is recorded at 969 F.2d 835 (9th Cir. 1992). A copy of the opinion is attached hereto as Appendix A.

The opinion of the United States District Court for the Central District of California entered on February 19, 1991 affirming Respondent's Summary Judgment Order entered by the United States Bankruptcy Court for the Central District of California on July 16, 1990 is unreported. A copy of the opinion is attached hereto as Appendix B. The ruling of the United States Bankruptcy Court is contained in the Findings of Fact and Conclusions of Law in Support of Summary Judgment in Favor of the FDIC on the First, Second and Third Claims for Relief entered on July 16, 1990 ("Findings and Conclusions") and Order Granting Summary Judgment in Favor of the FDIC on the First, Second and Third Claims for Relief entered on July 18, 1990 ("Order"). A copy of the (i) Findings and Conclusions and (ii) Order are attached hereto as Appendix C and Appendix D, respectively.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals before the Ninth Circuit was entered on July 20, 1992. By Order filed December 8, 1992, the Ninth Circuit denied Petitioner's Petition for Rehearing and Suggestion of En Banc Consideration of Appellant Century Centre Partners, Ltd. Petitioner's Petition for Rehearing on Amended Opinion and Suggestion of En Banc Consideration of Appellant Century Centre Partners, Ltd. was denied by the Ninth

Circuit by Order filed January 8, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).[1]

STATEMENT OF THE CASE

A. The Nature of the Case:

This appeal involves the review of summary judgment based on a determination, supported only by dicta, that claims asserted by Century Centre Partners, Ltd. against the FSLIC Resolution Fund ("Fund") are barred by the *D'Oench Duhme* Doctrine espoused by the United States Supreme Court in the case of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) ("*D'Oench*") as a matter of law. Petitioner seeks a ruling that summary judgment is not proper as a matter of law or, alternatively, that summary judgment was not proper on the record below. Petitioner submits that judgment could only be proper in this case upon the consideration of two issues. First, who is the current holder of the Note(s) and Lien(s) and, second, can the holder of the Notes and Liens assert *D'Oench* by any means other than the federal holder-in-due-course doctrine. This Court is respectfully requested to find that only upon the determination of these issues of law and fact, which were specifically *avoided* at the trial

[1] In its Order and Amended Opinion, the Ninth Circuit decided that, although the FDIC's fourth claim was not adjudicated, jurisdiction was proper since the status of the notes is entirely distinct from Century Centre's fourth claim and the decision as to those claims was conclusive. [See App. 12].

court level and *ignored* on appeal, can any judgment be entered, under Rule 56 or otherwise.

B. The Proceedings Below:

1. The Petitioner's Claims and The Summary Judgment Motion:

This case arises out of a complex real estate transaction between Petitioner and Sunbelt Savings and Loan Association ("Old Sunbelt") and various successive holders of certain notes and liens including Sunbelt Savings, FSB ("New Sunbelt") and the Fund. The Petitioner filed for relief under Chapter 11 of Title 11, U.S. Code on November 21, 1988. [Record, p. 2 (Complaint, ¶ 1).] After the bankruptcy filing, the Fund became the holder of notes and liens on property of Petitioner. This transfer of the notes and liens through the banking agency process is detailed in the Record [Record, pp. 125-126 (Dash Decl. ¶ 12)], and resulted in the Fund filing a claim in the bankruptcy as the holder of the notes and liens.

On March 26, 1990, the Petitioner filed a Complaint (1) Objecting to Claim [11 U.S.C. §502 (1992)] and Requesting Reclassification of Claimed Interest; (2) for Equitable Subordination and Transference of Liens to Debtor's Estate [11 U.S.C. §510(c) (1979)]; (3) for Turnover of "Adequate Protection" Payments; and (4) for Breach of Covenant of Good Faith and Fair Dealing, and Fiduciary Duty ("Complaint"). The Petitioner's claims are detailed in the opinions below which are attached hereto as Exhibits A-C.

On or about May 18, 1990, the Fund filed its Amended Motion for Judgment on the Pleadings or, in

the Alternative, for Summary Judgment [Bankruptcy Rules 7012(c) and 7056] ("Amended Summary Judgment Motion"). In its Amended Summary Judgment Motion, the Fund requested judgment *only on the pleadings* on the grounds that (i) the Complaint filed by the Petitioner allegedly failed to state a claim against the Fund and that the Petitioner's claims were allegedly barred by *D'Oench*, the federal holder-in-due-course doctrine and 12 U.S.C. §1821(d)(9)(A) (1989) actually, 12 U.S.C. §1823(e) (1989); and (ii) there allegedly existed no genuine issues of fact material to the Fund's asserted defenses. [Record, p. 44 (Amended Summary Judgment Motion, ¶¶ A and B).] The Fund submitted *no* summary judgment evidence to the Court for consideration on its Amended Motion.

2. The Summary Judgment Ruling and Lower Court Decisions:

In July of 1990, the Bankruptcy Court entered the Summary Judgment Order and Findings of Fact and Conclusions of Law granting the Amended Motion as to the Complaint's first, second and third claims for relief, and denying the Amended Motion as to the fourth claim. On the fourth claim, the Bankruptcy Court found extant material issues of fact particularly relating to the existence of a settlement between the parties. The Bankruptcy Court held that, as a matter of law, the first, second and third claims for relief were barred by *D'Oench*. The Bankruptcy Court further concluded that Old Sunbelt's alleged misrepresentations and conduct constituted an "agreement" within the meaning of *D'Oench* and *Langley v. FDIC*, 484 U.S. 86 (1987), and that the Petitioner "lent

itself" to a scheme or arrangement likely to mislead banking authorities. [Record, p. 197 (Findings, Conclusions of Law Nos. 2, 3, and 4).] Additionally, while the Bankruptcy Court did not rule in favor of the Fund on the fourth claim for relief, the Court did rule that the Fund had no fiduciary duty or derivative duty of good faith and fair dealing to the Debtor by virtue of Old Sunbelt's conduct (as opposed to the Fund's post-takeover conduct). [Record, p. 197 (Conclusion of Law No. 5).] **The Bankruptcy Court expressly declined to reach the issues of the applicability of 12 U.S.C. §1823(e) (1989) or the federal holder-in-due-course doctrine, and made no findings or conclusions as to these issues.** [Record, p. 198 (Conclusion of Law No. 7).] Thus, the Bankruptcy Court's Opinion relies solely upon an application of *D'Oench* to the Fund as a matter of law. The fourth claim as it relates to the Fund's post-takeover activity still constitutes an active and unresolved dispute between the parties.

On appeal to the United States District Court for the Central District of California, the District Court affirmed the Bankruptcy Court's Summary Judgment Order in favor of the Fund and in response to the Petitioner's arguments that: (i) Old Sunbelt's fraudulent misrepresentations induced the Petitioner into entering into the loans and (ii) the Fund's loans were actually an equity investment instead of a debt interest, the District Court held that *D'Oench* and the line of cases applying such doctrine precluded consideration of the Petitioner's allegations because Century Centre had lent itself to a scheme or arrangement likely to mislead the banking authorities simply by executing the loan documents with allegedly

unrecorded conditions. [Op. p. 13] The Court went on to hold that the test in the Ninth Circuit for the application of *D'Oench* was not whether the Petitioner entered into any side agreement with the lender, but whether the Petitioner lent itself to a scheme or arrangement likely to mislead banking authorities. [Op. p. 14].

Similarly, the Ninth Circuit upheld the Summary Judgment Order. Interestingly, the Ninth Circuit made a specific finding that 12 U.S.C. §1823(e) did not apply in this case. [See App. 13]. This is critical since the result of this ruling by the Ninth Circuit is that the Fund can only assert *D'Oench* if allowed by common law. Thus, it can be said that each of the lower court rulings in this matter end up based only upon the direct common law application of *D'Oench* to the Fund. The legal effect of this rote process is to allow *D'Oench* to apply to the Fund without the critical determination, much less findings that the Fund is a holder-in-due-course and without determining that it holds a non-negotiable instrument. Other than the FDIC acting as receiver, there are only two ways in which *D'Oench* can apply as a defense to claims. *D'Oench* can only apply to a holder of an instrument if it is determined, as a matter of law, that §1823(e) is applicable or that the holder of an instrument is entitled to *D'Oench* under the federal holder-in-due-course doctrine. *Sunbelt Savings, FSB Dallas v. Montross*, 923 F.2d 353, 355-357 (5th Cir. 1991). Therefore, since the Ninth Circuit held that §1823(e) was not applicable to the Fund, the Court's failure to determine that *D'Oench* does not apply to the Fund or to remand for findings as to holder-in-due-course status is even more crucial because *D'Oench* can

only apply to the Fund through the federal holder-in-due-course doctrine.

STATEMENT OF FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

A. The Genesis of the Sunbelt Note(s) and the AITD:

The only evidence filed in the trial court on summary judgment determination was presented by the Petitioner and is fully contained in the lower court opinions in Exhibits A-C. Therefore, Petitioner will only summarize those facts in these papers.

During the latter part of 1984, Old Sunbelt acquired numerous real properties, including the Centroplex, from C-D Investment Co., a California general partnership ("CD"). [Record, p. 167 (Katz Decl., ¶ 4) and pp. 2-3 (Complaint, ¶ 5).] Old Sunbelt formed Sun Cal, Inc., a Texas Corporation ("Sun Cal"), as a wholly owned subsidiary of Old Sunbelt, for the purpose of acquiring the real properties. Old Sunbelt appointed two of its officers and/or employees, Stanley Castleton ("Castleton") and William Dobrowolski ("Dobrowolski") as the officers of Sun Cal. [Record, p. 168 (Katz Decl., ¶ 5) and pp. 3-4 (Complaint, ¶ 6).]

Old Sunbelt then caused Sun Cal to form numerous limited partnerships to actually take title to the various properties, with Sun Cal as the general partner of those partnerships and CD as the limited partner. Sun Cal subsequently acquired CD's interest in the partnerships.

[Record, p. 168 (Katz Decl., ¶ 6) and p. 4 (Complaint, ¶ 7).]

In March of 1986, Old Sunbelt transferred the Centroplex to the Petitioner. At that time, Old Sunbelt was wholly owned by Sun Cal, and Sun Cal was the Petitioner's general partner, and Castleton and Dobrowolski were its only limited partners. [Record, p. 134 (Katz Decl., ¶ 10).] It is at that time that Old Sunbelt first acquired a lien on the Centroplex. That lien arose from the creation of certain promissory notes, including an all inclusive promissory note dated March 19, 1986 in the principal sum of $236,718,866 (the notes, including the $236,718,866 note, and all replacement or amended notes are herein collectively referred to as the "Promissory Notes") which were secured by the AITD. [Record, p. 134 (Katz Decl., ¶ 10) and P. 5 (Complaint, ¶ 10).] As discussed below, the Notes are clearly not negotiable instruments and the Fund has never contended otherwise.

B. The Acquired Notes and Deeds of Trust:

American Residential Properties, Inc. ("ARP") syndicated a limited partnership interest in the Petitioner to Century Centre Associates Limited ("Associates") based upon financial information concerning the operations of the Centroplex which was provided by Old Sunbelt to ARP. That financial information indicated that the Centroplex was a financially viable operation which could service its secured debt. [Record, pp. 135-136 (Katz Decl., ¶ 15).] In fact, the information provided by Old Sunbelt was false, and the Petitioner was unable to service *any* of its secured debt. As a result, the Petitioner was constantly

beholden to Old Sunbelt to service the secured debt so that the Centroplex would not be foreclosed upon by its secured lender, Old Sunbelt. Thereafter, Old Sunbelt did service the debt and the Debtor's resulting subservience to Old Sunbelt enabled Old Sunbelt to maintain total control over the Centroplex and the Petitioner's operations, as Associates feared that it would lose its capital investment if Old Sunbelt did not service the secured debt and one of the secured lenders foreclosed. [Record, pp. 139-141 (Katz Decl., ¶¶ 21-24) and p. 10 (Complaint, ¶ 20).]

Associates threatened Old Sunbelt with litigation on account of the false information provided by Old Sunbelt. Old Sunbelt then offered to buy out Associates' equity interest in the Petitioner, subject to obtaining regulatory approval from the Federal Home Loan Bank Board ("FHLBB"). [Record, pp. 141-142 (Katz Decl., ¶¶ 26-27) and pp. 11-12 (Complaint, ¶¶ 23-24).]

Thereafter, Old Sunbelt did, in fact, obtain FHLBB approval to buy out Associates' equity interest in the Petitioner, contingent upon Old Sunbelt first acquiring all of the secured indebtedness on the Centroplex so that Old Sunbelt would be able to market the property free from the threat of foreclosure by the lenders, and hopefully, receive a return on its investment. [Record, p. 142 (Katz Decl., ¶ 28) and p. 12 (Complaint, ¶ 25).] In other words, the FHLBB instructed Old Sunbelt to acquire all of the indebtedness on the Centroplex so that, when Old Sunbelt bought out Associates' equity interest in the Petitioner, Old Sunbelt and its alter egos would effectively own the Centroplex free and clear of encumbrances. The FHLBB directive was obviously aimed at protecting Old

Sunbelt's equity position in the Centroplex. If the FHLBB believed that Old Sunbelt was a valid lienholder rather than an equity holder, it would have directed Old Sunbelt to foreclose its AITD, and certainly would not have authorized Old Sunbelt to expend the funds required to acquire Associates' equity position, which was the only equity position not directly or indirectly owned by Old Sunbelt.

Based upon FHLBB's directive, Old Sunbelt ultimately acquired all of the liens and notes on the Centroplex at a substantial discount, except the indebtedness to Security Pacific National Bank ("Security Pacific") secured by a first priority deed of trust on the Hotel, and the indebtedness to General Electric Capital Corporation ("GECC") secured by a first priority deed of trust on two of the office buildings. [Record, pp. 142-143 (Katz Decl., ¶ 29) and p. 12 (Complaint, ¶ 26).] As a result of Old Sunbelt's inability to strike a deal with GECC and Security Pacific for the acquisition of their interests in the Centroplex, Old Sunbelt was unable to obtain total control over the fate of the Centroplex, and therefore, could not accomplish its goals and the directive of the FHLBB.

C. The FSLIC Takeover of Old Sunbelt and the Transfer of the Notes and Liens to the Fund:

On August 19, 1988, the FSLIC was appointed as receiver for Old Sunbelt, and the assets of Old Sunbelt were then immediately transferred by the receiver to New Sunbelt (an entity created by the FSLIC to receive the assets of Old Sunbelt and other institutions). [Record, p. 45 (Summary Judgment Motion, p. 3, ¶ 4).]

On August 1, 1989, the FSLIC Resolution Fund was created to liquidate the assets of FSLIC regulated institutions which were closed prior to the enactment of the Financial Institutions Record, Recovery and Enforcement Act of 1989 ("FIRREA"). Under FIRREA, the FDIC became the manager of the Fund. The various notes and deeds of trust which are the subject of this action were transferred by New Sunbelt to the Fund. [Record, p. 45 (Summary Judgment Motion, p. 3, ¶ 4).]

On November 25, 1991, the Ninth Circuit entered an Order designating the FDIC as Manager of the FSLIC Resolution Fund as the true party in interest in this case. In a gross attempt to stretch *D'Oench* to cover the Fund which is, by the FDIC's own admission, the entity holding the Promissory Notes and the Liens and is the beneficiary of the AITD, the FDIC is now taking the position (in the Federal Deposit Insurance Corporation Opposition to Petition for Rehearing) that the FSLIC Resolution Fund is "merely an accounting mechanism" and that for the purposes of applying *D'Oench*, the Courts should look directly at the Fund, but see only the FDIC. Clearly, the FDIC wishes to take *D'Oench* where no legal theory has gone before and apply it to the Fund solely because the FDIC is its Manager. For this reason, Petitioner continues to refer to the Respondent as the Fund, the Defendant in the trial court and the party in favor of whom the trial court granted summary judgment.

Additionally, solely because the style of this case has changed to read "FDIC as Manager of the Fund" and not the "Fund", clearly the FDIC cannot assert any additional rights or defenses beyond which the Fund in fact could assert. Likewise, the FDIC cannot, because of its new

place on the style of the case, raise defenses that were not available to the Fund at the time of the entry of the partial summary judgment.

REASONS FOR GRANTING THE PETITION

When reviewing an order of summary judgment, the Supreme Court should apply the same legal standards as applied by the appellate court to determine whether summary judgment is appropriate. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment is appropriate only if after adequate discovery there is "no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).[2] In considering a summary judgment motion this Court has held that "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the Motion." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962)).

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[2] The Court should note that the trial court also granted a Motion for Protective Order of the Fund which quashed a subpoena and all discovery. The trial court found that no discovery was needed and yet *declined* to rule on the federal holder-in-due-course doctrine. See Protective Order Re Debtor's Request for Production of Documents filed June 8, 1990.

A review of the facts in this case show the Ninth Circuit was "clearly erroneous" in affirming the Fund's Summary Judgment Order. Fed.R.Civ.P. 52(a). In ignoring these aspects of this case, the lower courts wholly failed to consider serious and genuine issues of material fact and law. The lower court wholly failed to consider the "genuine issues" of: (i) who is the current holder of the Note(s) and Lien(s) and, (ii) whether the holder of the Notes and Liens can assert *D'Oench* by any means other than the federal holder-in-due-course doctrine. The Ninth Circuit did rule that §1823(e) was not available to the holder of these notes, but then failed to address the distinction between the Fund and the FDIC as its Manager, and failed to articulate, other than a vague reference to dicta in *Langley,* how the Fund gets to assert *D'Oench* without the benefit of §1823(e).

The linchpin of the Ninth Circuit Opinion is "dicta" in *Langley. Langley,* however, addresses the meaning of the term "agreement" under §1823(e), the very statute the Ninth Circuit has concluded does not apply. In fact, there is no language in *Langley,* dicta or otherwise, which can support the Ninth Circuit Opinion in this case. *Langley* involved the FDIC as receiver of a failed institution, a fact which immediately eliminates the need for an analysis of the applicability of the federal holder-in-due-course doctrine as in the case at bar. Equally important, however, is the fact that *D'Oench* is only mentioned in *Langley* in the context of explaining how Congress arrived at using the term "agreement" in §1823(e). *Langley,* at 401. To make the quantum leap that this discussion of the term "agreement" somehow provides a basis for summary judgment, when the Ninth Circuit has specifically ruled that

§1823(e) does not apply to the Fund, allows the draconian use of *D'Oench* without consideration of what person or entity holds an instrument for collection and the negotiability or non-negotiability of the instrument in question. In essence, to use dicta from *Langley* as a basis for enacting *D'Oench* eliminates the entire body of law known as the federal holder-in-due-course doctrine.

A. There is a Conflict in the Circuits on the Application of *D'Oench* to the Fund or any other Holder Absent a Determination of Holder-in-Due-Course Status.

The Ninth Circuit's ruling in the present case creates a conflict and reflects continuing confusion and division among the Circuits regarding the applicability of *D'Oench*. See *Bell & Murphy and Associates, Inc. v. Inter-First Bank Gateway*, 894 F.2d 750 (5th Cir. 1990); *Gunter v. Hutcheson*, 674 F.2d 862, 867 (11th Cir. 1982), cert. denied 459 U.S. 826, 103 S.Ct. 60, 74 L.Ed.2d 63 (1982); and *FDIC v. Wood*, 758 F.2d 156, 159 (6th Cir. 1985). Based solely on dicta from *Langley*, supra, the Ninth Circuit held that *D'Oench* applies to shield the Fund and, implicitly, the FDIC, as Manager of the Fund, while acting in its corporate capacity. [App. 13-14]. However, this ruling is contra to decisions in the Fifth, Sixth and Eleventh Circuits.

Specifically, the Fifth Circuit has held that the FDIC in its corporate capacity can rely *only* upon the statutory protections of §1823(e) and that the FDIC is only entitled to the common law protections of *D'Oench* as a receiver.[3] *Bell & Murphy and Associates, Inc.*, 894 F.2d at 753.

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[3] The Fund, a fairly new government entity, is not the subject of much reported case law. However, the Fund is creeping

The Sixth and Eleventh Circuits have previously found that *D'Oench* did not apply to the FDIC which had been sued in its corporate capacity pre-FIRREA. As a result, both Circuits in their respective cases developed and applied the federal holder-in-due-course doctrine. See *Gunter*, 674 F.2d at 867; *Wood*, 758 F.2d at 159.

The Ninth Circuit assumed, without deciding, that the application of *D'Oench* somehow shielded the Fund. [See App. 12-13]. Thus, Petitioner submits the time is ripe for the Court to address this recurring issue and make clear that the application of *D'Oench* turns on the capacity in which a government agency is acting or turns on the type and nature of the instrument in the hands of any holder.

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into district court opinions and courts are applying the federal holder-in-due-course doctrine to the Fund. For example, the Court is referred to a recent District Court holding in which the Northern District of Texas held that the Fund, and not FDIC-Corporate, is the ultimate assignee of the FDIC out of a liquidation. *FDIC v. Thompson & Knight, et al.*, 1993 WL 88758 (N.D. Tex. 1993). *See also Resolution Trust Corporation v. Oaks Apartments Joint Venture, et al.*, 753 F.Supp. 1332, 1337 (N.D. Tex. 1990), *aff'd in part, vacated, and remanded in part*, 966 F.2d 995 (5th Cir. 1992) (*D'Oench* not available to RTC or any other recent creation of Congress unless federal holder-in-due-course doctrine applies).

In addition to the division among the Courts of Appeals, several lower courts have held that §1823(e) applies to the FDIC only in its corporate capacity and not in its capacity as a receiver. See *In re C.P.C. Dev. Co. No. 5*, 113 Bankr. 637, 640 (Bankr. C. D. Calif. 1990); *In re Kanterman*, 108 Bankr. 432, 433 (Bankr. S.D.N.Y. 1989), 97 Bankr. 768, 774 (Bankr. S.D.N.Y. 1989).

In *In re Woodstone Limited Partnership*, 133 Bankr. 678 (Bankr. E.D.N.Y. 1991), the Court also held that prior to FIRREA, *D'Oench* did not apply to the FDIC in its corporate capacity and that Congress specifically codified *D'Oench* for the FDIC acting in its corporate capacity by enacting §1823(e). Here, the Ninth Circuit's holding that §1823(e) does not apply and yet holding that *D'Oench* applies to the FDIC in its corporate capacity as Manager of the Fund directly conflicts with both the decisions and the reasoning in the *Montross, Gunter* and *Wood* cases, supra, as well as in other district court cases, and shows that in determining the applicability of *D'Oench*, the Courts have reached inconsistent results under essentially the same circumstances. This Court, therefore, should now intervene and decide the proper application of *D'Oench* to holders of instruments other than the FDIC as receiver.

B. This Court should remand this case for a determination of the applicability of the federal holder-in-due-course doctrine or reject the Ninth Circuit's implicit holding that the *D'Oench Duhme* Doctrine applies to the Fund or FDIC-Corporate as the Holder of a non-negotiable instrument.

This Court should likewise reject the Ninth Circuit's implicit ruling that *D'Oench* applies to the Fund as a

matter of law even though holding a non-negotiable instrument.[4] *D'Oench* can only apply to the Fund, or the FDIC as Manager of the Fund for that matter, if holding a negotiable instrument. *Montross*, 923 F.2d at 355-357. In fact, the Fund has admitted on p. 11, footnote 7 of its Notice of Motion and Motion of FSLIC Resolution Fund for Judgment on the Pleadings, or in the Alternative, for Summary Judgment [Bankr. Rules 7012(c) and 7056]; Memorandum of Points and Authorities in Support Thereof, that *D'Oench* "is a reflection of the status of the FDIC or FSLIC as holders-in-due-course with respect to negotiable instruments acquired from failed institutions. "Negotiability is the foundation underlying holder-in-due-course status." *Montross*, 923 F.2d at 356. Thus, it is patently wrong, or a conflict with the Fifth Circuit, to argue that it is not necessary to determine the status of the Fund, or any other holder as a holder-in-due-course of a negotiable instrument before applying *D'Oench*. This is especially true since the Fund implicitly admits it is not the holder of a negotiable instrument. Nowhere in the pleadings does the Fund assert that it is holding a negotiable instrument nor does the Fund assert anywhere that it is not holding a non-negotiable instrument. *See generally*, Answer of the FSLIC Resolution Fund to Debtor's Complaint Objecting to Claims; Federal Deposit Insurance Corporation Opposition to Petition for Rehearing.

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[4] The Court should presume that the Notes are not negotiable in light of no evidence presented by FDIC to the contrary and the refusal of the trial court to make any findings on this issue.

Therefore, before *D'Oench* can apply to the Fund when it holds a note or other instrument, the Court must decide whether the Fund, or any holder other than FDIC-Receiver, is a holder-in-due-course. The Ninth Circuit erred in not considering and deciding the issue of holder-in-due-course status, and the reference to dicta in *Langley* as a basis to apply *D'Oench* is in contravention to other circuit court holdings regarding the extension of federal holder-in-due-course status to the FDIC or any other holder of a note or other instrument. In fact, the Fifth Circuit in *Montross*, 923 F.2d at 355-357, specifically refused to extend federal holder-in-due-course status to even the FDIC when it holds a non-negotiable instrument. "Non-negotiable instruments are contractual obligations which do not enjoy holder-in-due-course status." *Id.* at 356.

Moreover, the First Circuit has also held that holder-in-due-course status is pertinent to the applicability of *D'Oench* but has no consequence to the applicability of §1823(e). *Federal Deposit Insurance Corp. v. P.L.M. International, Inc.*, 843 F.2d 248 (1st Cir. 1987). Finally, the Sixth Circuit in *Wood*, supra, held that in order to apply the federal common law of *D'Oench* a court must first determine that the holder of an instrument, in that case the FDIC, is a holder-in-due-course. *Wood*, 758 F.2d at 159.

Since §1823(a) protection could have been granted to the Fund by Congress but to date has not, the Fund's status as a holder-in-due-course when it acquires an instrument is determined on a case-by-case basis. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979). In fact, the Sixth Circuit in *Wood*, supra, stated that despite Congressional intent to protect

the FDIC, §1823(e) does not itself automatically authorize holder-in-due-course status. *Wood*, 758 at p. 159. Nor does *D'Oench* automatically confer such status upon a governmental agency, including the FDIC. See id. This is in direct contravention to the ruling of the Ninth Circuit in this case.

Further, the district courts are divided on this issue. In *In re Woodstone*, supra, the Court found that there was no basis in the opinion of, or policy behind, *D'Oench* to allow automatic holder-in-due-course status. See also *FDIC v. Thompson & Knight, et al.*, supra; *New Connecticut Bank & Trust v. Stadium Management*, 132 Bankr. 205, 209 (Bankr. D. Mass. 1991).

Based upon the Fund's own admissions that for *D'Oench* to apply, the Fund must be a holder-in-due-course and that it is not the holder of a negotiable instrument, a determination of the Fund's position as a holder-in-due-course is essential and the Ninth Circuit's refusal to make such a determination, or remand for further proceedings, is error.

CONCLUSION

This Honorable Court must not allow the Ninth Circuit's ruling to stand. To do so would be to sanction the automatic extension of holder-in-due-course status to the Fund, when holding a non-negotiable instrument. Such a holding would give the FDIC and their successors the ability to transmute lead into gold by allowing agencies to transform contracts into negotiable instruments. That

kind of alchemy is best left in the hands of Congress. See *Montross* at p. 356.

Petitioner is therefore asking this Court to reject the Ninth Circuit application of the *D'Oench Duhme* Doctrine to the case at bar. The Court should announce a holding that *D'Oench* does not apply to the Fund or the FDIC as its manager when holding a non-negotiable instrument and reverse summary judgment against the Petitioner's claims and remand this action for further proceeding. In the alternative, Petitioner submits that the record demonstrates that the trial and appellate courts ignored and avoided the fundamental issues of negotiability and holder-in-due-course status. Without evidence or findings on this issue, this Honorable Court should remand this action for further proceedings and findings with respect to summary judgment.

Respectfully submitted,

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APPENDIX A

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 91-55439
CT/AG#: CV-90-4929-JGD

IN RE: CENTURY CENTRE PARTNERS LIMITED,

Debtor.

CENTURY CENTRE PARTNERS LIMITED,

Plaintiff – Appellant

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Defendant – Appellee

(Filed Mar. 24, 1993)

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED Filed and entered July 20, 1992.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CENTURY CENTRE PARTNERS LIMITED, *Debtor.* CENTURY CENTRE PARTNERS LIMITED, *Plaintiff-Appellant,* v. FEDERAL DEPOSIT INSURANCE CORPORATION, *Defendant-Appellee.*	No. 91-55439 D.C. No. CV-90-4929-JGD ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
April 9, 1992 – Pasadena, California

Filed July 20, 1992
Amended November 5, 1992

Before: Alfred T. Goodwin, William A. Norris and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Banking/Loans and Lenders/Savings and Loans/Bankruptcy/Business Law/Contracts

Affirming a district court judgment upholding a grant of summary judgment by the bankruptcy court, the court of appeals held that fraudulent misrepresentations made by a savings and loan bank to a borrower concerning a loan agreement, resulting in a scheme or arrangement likely to deceive the government and injure bank creditors, could not be used by the borrower as a defense in its bankruptcy proceeding declaring the loan contract a secured claim of the FDIC, as receiver of the bank.

Appellant Century Centre Partners Limited, a chapter 11 debtor, brought suit against the Federal Deposit Insurance Corporation (FDIC) in the bankruptcy court. Century Centre objected to the bankruptcy court's classification of a loan agreement between Century Centre and a savings and loan bank as a secured claim of the FDIC in its status as receiver of the bank. Century Centre requested that the FDIC's secured claims be reclassified as equity interests (First Claim); sought equitable subordination of the FDIC claims and requested transfer of the FDIC's liens to the debtor's estate (Second Claim); sought turnover of payments by Century Centre to the FDIC as a secured creditor (Third Claim); and alleged breach of the covenant of good faith and fair dealing and of fiduciary duty by FDIC in disapproving a proposed settlement (Fourth Claim). The bankruptcy court granted summary judgment to the FDIC on the first three claims, declining to do so on the fourth one because material facts remained in dispute. The district court affirmed this judgment. On appeal, Century Centre argued that the notes

evidencing the financing agreement were unenforceable because of the bank's misrepresentations by means of which the bank deceived Century Centre as to the debt service and retained effective control of Century Centre because of Century Centre's dependence on its help.

However, the difficulty with this position was the doctrine established in *D'Oench, Dehme,* as reinforced in *Langley v. FDIC.* For the same reason that fraudulent promises were held not to be a defense under the Federal Deposit Insurance Act, the misrepresentations of the bank to Century Centre were not a defense in this case. The court could not condone a transaction with the capacity to deceive the banking regulators. The court rejected Century Centre's contention that it was eligible for the "innocent borrower" *Meo* exception to *D'Oench. Meo* is properly invoked only by borrowers who are innocent of any wrongdoing or negligence. Here, Century Centre did not qualify for this exception, since it could have investigated the financial background of the bank before signing the loan documents. Since Century Centre did not do so, it lent itself to a scheme or arrangement likely to deceive the government regulators and injure the bank's creditors. The court rejected Century Centre's contention that the notes in question were equity and should be so classified since the bank was not Century Centre's creditor but its co-owner. The court found the control that the bank exercised over Century Centre was that of a creditor over a needy and subservient debtor. Accordingly, summary judgment was appropriate.

COUNSEL

Patrick F. McManemin, McManemin & Smith, Dallas, Texas, for the plaintiff-appellant.

Kathleen M. White, Tron & White, Pasadena, California, for the defendant-appellee.

ORDER

Slip Opinion, p.8643, line 4, change "bank had been taken over" to "note had been acquired."

Slip Opinion, p.8644, ¶ 3, line 12, change "financial background of Old Sunset" to "financial background of the Properties."

Slip Opinion, p.8644, ¶ 3, line 16 is hereby modified by adding after "Sunbelt's creditors" the following sentence:

> A borrower who fails to ensure that the terms of the loan are explicitly incorporated into the obligation where opportunity to do so exists is guilty of "negligence." *Gemini*, 921 F.2d at 245.

OPINION

NOONAN, Circuit Judge:

Century Centre Partners, Ltd. ("Century Centre"), a Chapter 11 debtor, brought suit against the Federal Deposit Insurance Corporation ("FDIC") in the bankruptcy court for the Central District of California. Century Centre objected to the FDIC's secured claims and requested that they be reclassified as equity interests

(First Claim); sought equitable subordination of the FDIC claims and requested transfer of the FDIC's liens to the debtor's estate (Second Claim); sought turnover of payments by Century Centre to the FDIC as a secured creditor (Third Claim); and alleged breach of the covenant of good faith and fair dealing and of fiduciary duty by FDIC in disapproving a proposed settlement (Fourth Claim).

Bankruptcy court granted summary judgment to the FDIC on the First, Second and Third Claims, declining to do so on the Fourth Claim because material facts remained in dispute. The district court affirmed the judgment of the bankruptcy court. We now affirm the district court.

FACTS

For purposes of this appeal, and for no other purpose in this litigation, we accept the following facts as true. They are taken from the declaration filed March 25, 1990 by Aron B. Katz, president of the General partner of Century Centre:

In the latter part of 1984 Sunbelt Savings Association of Texas ("Old Sunbelt"), a Texas savings and loan association, entered into negotiations with C-D Investment Co., by which Old Sunbelt acquired the Centroplex Project located on 11.2 acres on the northwest corner of Century Boulevard and Balanca Avenue, Los Angeles, California ("the Properties"). The acquisition by Old Sunbelt was done through its wholly-owned subsidiary, Sun Cal, Inc., whose principal officers, Stanley Castleton and William Dobrowlski, had been employees of Old Sunbelt.

Old Sunbelt was later advised by its independent auditors that continued ownership of the Properties through its subsidiary would result in Old Sunbelt being treated as undercapitalized for regulatory purposes. Old Sunbelt, therefore, arranged a transaction divesting itself of apparent control of the Properties while retaining actual control, as follows: Old Sunbelt sold the stock of Sun Cal to May Cal, Inc., a California corporation wholly owned and controlled by Castleton and Dobrowlski. The financing for May Cal's purchase of all of Sun Cal's stock was furnished by Old Sunbelt and was secured by the stock of May Cal so that Old Sunbelt could continue to control the properties through its control of Castleton and Dobrowlski.

This transaction did not satisfy the criticism of Old Sunbelt's independent auditors and in order "to divest itself of ownership and control" of the Properties, Old Sunbelt arranged for the formation of Century Centre, a Texas partnership, and the transfer of the properties to Century Centre. Century Centre was wholly owned by Sun Cal, Castleton and Dobrowlski. In return for the Properties, Century Centre executed a promissory note and deed of trust to Old Sunbelt.

Even this transaction did not satisfy the criticism of the independent auditors, who foresaw a continuation of the regulatory problems of Old Sunbelt. Consequently, Old Sunbelt concluded that the only solution was "a transfer of a substantial interest" in Century Centre "to a new independent entity." This conclusion was reached some time in the first half of 1986. To carry out this new

plan Old Sunbelt approached American Residential Properties ("ARP") with a proposal that ARP purchase a controlling interest in Century Centre. ARP thereupon organized a partnership. Century Centre Associates Limited, a Texas limited partnership ("Associates"). Associates, in turn, acquired an equity interest in Century Centre. At the same time ARP organized ARP Century Centre, Inc., a corporation that became the new general partner of Century Centre. Katz was president of ARP and became president of ARP and became president of ARP Century Centre, Inc.

On August 29, 1986 ARP, Sun Cal and Century Centre entered into an Agreement for the reorganization and recapitalization of Century Centre. Simultaneously, ARP Century Centre and Old Sunbelt entered into a Restructured Debt Agreement. These transactions were approved by Old Sunbelt's independent auditors as the new agreement would allow the auditors "to treat the Centroplex Properties and the related transactions as a loan by Old Sunbelt rather [than as] an equity investment by Old Sunbelt." At the same time, according to Katz, Old Sunbelt intended to retain total control over the Properties.

As part of the transactions on August 29, 1986, Century Centre executed a note in the sum of $242,742,175 to Old Sunbelt; a second note in the sum of $25,357,235 to Old Sunbelt; and a third note in the sum of $10,000,000 payable to Old Sunbelt ("the Notes"). Century Centre also made certain related pledges to Old Sunbelt and made or amended certain loan agreements with Old Sunbelt. Century Centre ARP became Century Centre's general partner. Simultaneously Associates made a cash contribution to Century Centre and also executed a note

for $28 million in favor of Century Centre. This note was pledged by Century Centre to Old Sunbelt. The note was secured by pledges of Associates' limited partnership interest in Century Centre and a pledge of the general partner's interest in Century Centre.

Through control over the pledged note of Associates and the pledges for this note and through control of Castleton and Dobrowlski, Katz alleges, Old Sunbelt "continued exercising dominance, decision-making control, authority, and final approval of all decisions and issues with respect to the transaction contemplated by the reorganization agreement and related loan documents." Old Sunbelt was "the de facto co-owner" of Century Centre.

In obtaining agreement to the transaction of August 29, 1986. Old Sunbelt had made various misrepresentations to ARP and Associates as to the income and expenses of the Properties. As a consequence, Century Centre found itself unable to service the secured debt and remained in the control of Old Sunbelt because of its inability to service the debt. Day-to-day decisions relating to Century Centre were made at the bidding of Old Sunbelt without consultation with Century Centre or its general partner, ARP Century Centre, Inc.

Late in 1987, despite Old Sunbelt's alleged dominance, Century Centre informed Old Sunbelt that it believed that Old Sunbelt had perpetrated a fraud upon it. ARP, ARP Century Centre and Associates and advised Old Sunbelt that the parties intended to sue Old Sunbelt. Negotiations ensued, leading to a proposed settlement. Old Sunbelt was unsuccessful in meeting one condition of

the settlement, namely, the acquisition of all lines on the properties. Ultimately, Century Centre was required to *file for Chapter 11 protection to avoid foreclosure by a* principal lienholder, Security Pacific Bank.

On August 29, 1988 the Federal Home Loan Bank Board placed Old Sunbelt under the control of the Federal Savings Loan Insurance Corporation (FSLIC) as receiver. FSLIC transferred Old Sunbelt's assets to a new entity, Sunbelt Savings (New Sunbelt). New Sunbelt then transferred the assets to FSLIC Corporate, which assigned them for management to the FDIC in its corporate capacity by reason of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, 253 (1989).

As of the date of Century Centre's entry into Chapter 11, Century Centre owed $160 million on the Notes executed on August 29, 1986.

PROCEEDINGS

On March 26, 1990 Century Centre filed the four claims previously noted against the FDIC. The FDIC moved for summary judgment, which was granted by the bankruptcy court on the first three claims. The Fourth Claim involved material facts that were in dispute, so summary judgment was denied. The district court affirmed. Century Centre appeals the judgment in the FDIC's favor.

JURISDICTION

The FDIC's Fourth Claim was not adjudicated, and the question has been raised by the court on its own motion as to whether the court has a final judgment to review. In bankruptcy proceedings "the rules of finalty developed under the general grant of appellate jurisdiction provided in 28 U.S.C. § 1291 (1982) are given a flexible reading." *In re Victoria Station, Inc.*, 840 F.2d 682, 683 (9th Cir. 1988). Certain proceedings are "so distinct and conclusive" that final decisions as to them "should be appealable as of right." *Id.* (quoting *Mason v. Integrity Ins. Co.*, 709 F.2d 1313 (9th Cir. 1983)). In the present case the status of the notes is entirely distinct from Century Centre's Fourth Claim, and the decision as to these claims is conclusive. We may properly exercise jurisdiction.

ANALYSIS

On appeal Century Centre strenuously presses the contention that the Notes were unenforceable because of Old Sunbelt's misrepresentations by means of which Old Sunbelt deceived Century Centre as to the debt service and retained effective control of Century Centre because of Century Centre's dependence on its help. The difficulty with this position is the doctrine established in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), as reinforced in *Langley v. FDIC*, 484 U.S. 86 (1987).

D'Oench, Duhme held that the maker of a note could not present as a defense to its enforcement a secret agreement between the note's maker and the lending bank when the note had been acquired by the federal insurer. *D'Oench, Duhme*, 315 U.S. at 460. It is this rule as

explained by *Langley* that controls here, even though *LANGLEY* itself is addressed to a statute that does not apply here. The statute is the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e), which provides: "No agreement which tends to diminish or defeat the right, title or interests of the Corporation [the FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation," unless certain conditions are met. The conditions are that the agreement is in writing; has been executed by the bank and the obligor at the time of the acquisition of the asset by the bank; was approved by the bank's directors or loan committee, with the approval reflected in their minutes, and has been continuously an official record of the bank. Interpreting this statute, *Langley* held that fraudulent promises inducing the borrower's execution of a note to a bank fall within the meaning of "agreement" and consequently cannot be used as a defense by the borrower against the FDIC. *Langley v. FDIC*, 484 U.S. 86, 92-93 (1987).

The statute, § 1823(e) only applies to assets that the FDIC acquires "either as security for a loan or by purchase or as receiver of an insured depository institution." The FDIC has acquired the assets of FSLIC not as its own funds but as their manager. FIRREA, 103 Stat. 183, 253 (1989). These funds have not been acquired by purchase nor as a security, nor have they been acquired by the FDIC being the "receiver" of an insured depository institution. Consequently, 12 U.S.C. § 1823(e) does not apply in this case.

Nevertheless, the dicta of *Langley* interpreting *D'Oench, Duhme* are controlling here. For the same reason

that fraudulent promises were held not to be a defense against § 1823 in *Langley,* the misrepresentations of Old Sunbelt are not a defense in the present case. *D'Oench* is intended to protect the federal insurer "in its various functions." *D'Oench,* 315 U.S. at 461. If Old Sunbelt did make fraudulent promises through Century Centre, there would be no way the bank examiners could detect the fraud from examination of the loan file and the Notes. The bank examiners would assume that the Notes were assets of the bank. The bank examiners could not know that the Notes were subject to conditions they could not know. Such situation would effectively deceive the examiners and deny the federal insurer the protection it must receive. "We cannot condone a transaction with the capacity to deceive the banking regulators." *FSLIC v. Gemini Management,* 921 F.2d 241, 245 (9th Cir. 1990).

Century Centre contends that it is eligible for the "innocent borrower" exception to *D'Oench,* first articulated by this court in *FDIC v. Meo,* 505 F.2d 790, 792 (9th Cir. 1974). The *Meo* exception must be read in light of the general policy of the *D'Oench* doctrine, which "favors the interests of depositors and creditors of a failed bank, who cannot protect themselves . . . over the interests of borrowers, who can." *FDIC v. McCullough,* 911 F.2d 593, 600 (11th Cir. 1990). *Meo* is properly invoked only by borrowers who are "innocent of any wrongdoing or negligence." *Meo,* 515 F.2d at 793. Century Centre does not qualify for the *Meo* exception, since it could have investigated the financial background of the Properties before signing the loan documents. Since Century Centre did not do so, it lent itself to a scheme or arrangement likely to

deceive the government regulators and to injure Old Sunbelt's creditors. A borrower who fails to ensure that the terms of the loan are explicitly incorporated into the obligation where opportunity to do so exists is guilty of "negligence." *Gemini*, 921 F.2d at 245.

Century Centre asserts that the Notes were equity and should be so classified. Old Sunbelt, it asserts, was not its creditor but its co-owner. *D'Oench, Duhme*, it suggests, does not apply in a situation where, in essence, a bank has been dealing with itself. A mere department or extension of Old Sunbelt could not be treated as a borrower; neither, Century Centre contends, can it.

The difficulty with this argument is that Century Centre has offered no evidence to back up its assertions. Its key declarant was Katz, who makes clear that he and Associates were not mere nominees for Old Sunbelt. They were independent actors, who put real money into Century Centre. Even if Old Sunbelt retained equity in Century Centre the general partner was Century Centre ARP, which in terms of equity had "a controlling interest." The control that old Sunbelt exercised, according to Katz's declaration, was that of a creditor over a needy and subservient debtor.

According to Katz's own declaration, the restructuring of August 29, 1986 was "approved" by Old Sunbelt's independent auditors – an approval that Katz's declaration admits would not have been given unless there was an equity interest in Century Centre distinct from Old Sunbelt's interest. Although Katz now says that he believes that Old Sunbelt "had the undisclosed intent of using ARP Century Centre and Associates as its pawns,"

there is not even a whisper in Katz's declaration that ARP Century Centre, as the general partner of Century Centre, was coerced into executing the Notes. Consequently, no material issue of fact was raised as to coercion in the execution of the Notes and the hypothetical possibility that this case might be distinguished from the wide variety ruled by *D'Oench, Duhme* does not materialize.

No material fact is in dispute. Summary judgment was in order.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: CENTURY CENTRE PARTNERS LIMITED, *Debtor,* CENTURY CENTRE PARTNERS LIMITED, *Plaintiff-Appellant,* v. FEDERAL DEPOSIT INSURANCE CORPORATION, *Defendant-Appellee.*	No. 91-55439 D.C. No. CV-90-4929-IGD OPINION

Appeal from the United States District Court
for the Central District of California
John G. Davies, District Judge, Presiding

Argued and Submitted
April 9, 1992 – Pasadena, California

Filed July 20, 1992

Before: Alfred T. Goodwin, William A. Norris and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Banking/Loans and lenders/Savings and Loans/Bankruptcy/Business Law/Contracts

Affirming a district court judgment upholding a grant of summary judgment by the bankruptcy court, the court of appeals held that fraudulent misrepresentations made by a savings and loan bank to a borrower concerning a loan agreement, resulting in a scheme or arrangement likely to deceive the government and injure bank creditors, could not be used by the borrower as a defense in its bankruptcy proceeding declaring the loan contract a secured claim of the FDIC, as receiver of the bank.

Appellant Century Centre Partners Limited, a Chapter 11 debtor, brought suit against the Federal Deposit Insurance Corporation (FDIC) in the bankruptcy court. Century Centre objected to the bankruptcy court's classification of a loan agreement between Century Centre and a savings and loan bank as a secured claim of the FDIC in its status as receiver of the bank. Century Centre requested that the FDIC's secured claims be reclassified as equity interests (First Claim); sought equitable subordination of the FDIC claims and requested transfer of the FDIC's liens to the debtor's estate (Second Claim); sought turnover of payments by Century Centre to the FDIC as a secured creditor (Third Claim); and alleged breach of the covenant of good faith and fair dealing and of fiduciary duty by FDIC in disapproving a proposed settlement (Fourth Claim). The bankruptcy court granted summary judgment to the FDIC on the first three claims, declining to do so on the fourth one because material facts remained in dispute. The district court affirmed this judgment. On appeal, Century Centre argued that the notes evidencing the financing agreement were unenforceable because of the bank's misrepresentations by means of which the bank deceived Century Centre as to the debt

service and retained effective control of Century Centre because of Century Centre's dependence on its help.

However, the difficulty with this position was the doctrine established in *D'Oench, Duhme,* as reinforced in *Langley v. FDIC.* For the same reason that fraudulent promises were held not to be a defense under the Federal Deposit Insurance Act, the misrepresentations of the bank to Century Centre were not a defense in this case. The court could not condone a transaction with the capacity to deceive the banking regulators. The court rejected Century Centre's contention that is was eligible for the "innocent borrower" *Meo* exception to *D'Oench. Meo* is properly invoked only by borrowers who are innocent of any wrongdoing or negligence. Here, Century Centre did not qualify for this exception, since it could have investigated the financial background of the bank before signing the loan documents. Since Century Centre did not do so, it lent itself to a scheme or arrangement likely to deceive the government regulators and injure the bank's creditors. The court rejected Century Centre's contention that the notes in question were equity and should be so classified since the bank was not Century Centre's creditor but its co-owner. The court found the control that the bank exercised over Century Centre was that of a creditor over a needy and subservient debtor. Accordingly, summary judgment was appropriate.

COUNSEL

Patrick F. McManemin, McManemin & Smith, Dallas, Texas, for the plaintiff-appellant.

Kathleen M. White, Tron & White, Pasadena, California, for the defendant-appellee.

OPINION

NOONAN, Circuit Judge:

Century Centre Partners, Ltd. ("Century Centre"), a Chapter 11 debtor, brought suit against the Federal Deposit Insurance Corporation ("FDIC") in the bankruptcy court for the Central District of California. Century Centre objected to the FDIC's secured claims and requested that they be reclassified as equity interests (First Claim); sought equitable subordination of the FDIC claims and requested transfer of the FDIC's liens to the debtor's estate (Second Claim); sought turnover of payments by Century Centre to the FDIC as a secured creditor (Third Claim); and alleged breach of the covenant of good faith and fair dealing and of fiduciary duty by FDIC in disapproving a proposed settlement (Fourth Claim).

That bankruptcy court granted summary judgment to the FDIC on the First, Second and Third Claims, declining to do so on the Fourth Claim because material facts remained in dispute. The district court affirmed the judgment of the bankruptcy court. We now affirm the district court.

FACTS

For purposes of this appeal, and for no other purpose in this litigation, we accept the following facts as true. They are taken from the declaration filed March 25, 1990

by Aron B. Katz, president of the general partner of Century Centre:

In the latter part of 1984 Sunbelt Savings Association of Texas ("Old Sunbelt"), a Texas savings and loan association, entered into negotiations with C-D Investment Co., by which Old Sunbelt acquired the Centroplex Project located on 11.2 acres on the northwest corner of Century Boulevard and Balanca Avenue, Los Angeles, California ("the Properties"). The acquisition by Old Sunbelt was done through its wholly-owned subsidiary, Sun Cal, Inc., whose principal officers, Stanley Castleton and William Dobrowlski, had been employees of Old Sunbelt.

Old Sunbelt was later advised by its independent auditors that continued ownership of the Properties through its subsidiary would result in Old Sunbelt being treated as undercapitalized for regulatory purposes. Old Sunbelt, therefore, arranged a transaction divesting itself of apparent control of the Properties while retaining actual control, as follows: Old Sunbelt sold the stock of Sun Cal to May Cal, Inc., a California corporation wholly owned and controlled by Castleton and Dobrowlski. The financing for May Cal's purchase of all of Sun Cal's stock was furnished by Old Sunbelt and was secured by the stock of May Cal so that Old Sunbelt could continue to control the properties through its control of Castleton and Dobrowlski.

This transaction did not satisfy the criticism of Old Sunbelt's independent auditors and in order "to divest itself of ownership and control" of the Properties, Old Sunbelt arranged for the formation of Century Centre, a Texas partnership, and the transfer of the properties to

Century Centre. Century Centre was wholly owned by Sun Cal, Castleton and Dobrowlski. In return for the Properties, Century Centre executed a promissory note and deed of trust to Old Sunbelt.

Even this transaction did not satisfy the criticism of the independent auditors, who foresaw a continuation of the regulatory problems of Old Sunbelt. Consequently, Old Sunbelt concluded that the only solution was "a transfer of a substantial interest" in Century Centre "to a new independent entity." This conclusion was reached some time in the first half of 1986. To carry out this new plan Old Sunbelt approached American Residential Properties ("ARP") with a proposal that ARP purchase a controlling interest in Century Centre. ARP thereupon organized a partnership, Century Centre Associates Limited, a Texas limited partnership ("Associates"). Associates, in turn, acquired an equity interest in Century Centre. At the same time ARP organized ARP Century Centre, Inc., a corporation that became the new general partner of Century Centre. Katz was president of ARP and became president of ARP Century Centre, Inc.

On August 29, 1986 ARP, Sun Cal and Century Centre entered into an Agreement for the reorganization and recapitalization of Century Centre. Simultaneously, ARP Century Centre and Old Sunbelt entered into a Restructured Debt Agreement. These transactions were approved by Old Sunbelt's independent auditors as the new agreement would allow the auditors "to treat the Centroplex Properties and the related transactions as a loan by Old Sunbelt rather [than as] an equity investment by Old Sunbelt." At the same time, according to Katz, Old Sunbelt intended to retain total control over the Properties.

As part of the transactions on August 29, 1986, Century Centre executed a note in the sum of $242,742,175 to Old Sunbelt; a second note in the sum of $25,357,235 to Old Sunbelt; and a third note in the sum of $10,000,000 payable to Old Sunbelt ("the Notes"). Century Centre also made certain related pledges to Old Sunbelt and made or amended certain loan agreements with Old Sunbelt. Century Centre ARP became Century Centre's general partner. Simultaneously Associates made a cash contribution to Century Centre and also executed a note for $28 million in favor of Century Centre. This note was pledged by Century Centre to Old Sunbelt. The note was secured by pledges of Associates' limited partnership interest in Century Centre and a pledge of the general partner's interest in Century Centre.

Through control over the pledged note of Associates and the pledges for this note and through control of Castleton and Dobrowlski, Katz alleges, Old Sunbelt "continued exercising dominance, decision-making control, authority, and final approval of all decisions and issues with respect to the transaction contemplated by the reorganization agreement and related loan documents." Old Sunbelt was "the de facto co-owner" of Century Centre.

In obtaining agreement to the transaction of August 29, 1986, Old Sunbelt had made various misrepresentations to ARP and Associates as to the income and expenses of the Properties. As a consequence, Century Centre found itself unable to service the secured debt and remained in the control of Old Sunbelt because of its inability to service the debt. Day-to-day decisions relating to Century Centre were made at the bidding of Old

Sunbelt without consultation with Century Centre or its general partner, ARP Century Centre, Inc.

Late in 1987, despite Old Sunbelt's alleged dominance, Century Centre informed Old Sunbelt that it believed that Old Sunbelt had perpetrated a fraud upon it, ARP, ARP Century Centre and Associates and advised Old Sunbelt that the parties intended to sue Old Sunbelt. Negotiations ensued, leading to a proposed settlement. Old Sunbelt was unsuccessful in meeting one condition of the settlement, namely the acquisition of all liens on the properties. Ultimately, Century Centre was required to file for Chapter 11 protection to avoid foreclosure by a principal lienholder, Security Pacific Bank.

On August 29, 1988 the Federal Home Loan Bank Board placed Old Sunbelt under the control of the Federal Savings Loan Insurance Corporation (FSLIC) as receiver. FSLIC transferred Old Sunbelt's assets to a new entity, Sunbelt Savings (New Sunbelt). New Sunbelt then transferred the assets to FSLIC Corporate, which assigned them for management to the FDIC in its corporate capacity by reason of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, 253 (1989).

As of the date of Century Centre's entry into Chapter 11, Century Centre owed $160 million on the Notes executed on August 29, 1986.

PROCEEDINGS

On March 26, 1990 Century Centre filed the four claims previously noted against the FDIC. The FDIC

moved for summary judgment, which was granted by the bankruptcy court on the first three claims. The Fourth Claim involved material facts that were in dispute, so summary judgment was denied. The district court affirmed. Century Centre appeals the judgment in the FDIC's favor.

JURISDICTION

The FDIC's Fourth Claim was not adjudicated, and the question has been raised by the court on its own motion as to whether the court has a final judgment to review. In bankruptcy proceedings "the rules of finalty developed under the general grant of appellate jurisdiction provided in 28 U.S.C. § 1291 (1982) are given a flexible reading." *In re Victoria Station, Inc.*, 840 F.2d 682, 683 (9th Cir. 1988). Certain proceedings are "so distinct and conclusive" that final decisions as to them "should be appealable as of right." *Id.* (quoting *Mason v. Integrity Ins. Co.*, 709 F.2d 1313, 1318 (9th Cir. 1983)). In the present case the status of the notes is entirely distinct from Century Centre's Fourth Claim, and the decision as to these claims is conclusive. We may properly exercise jurisdiction.

ANALYSIS

On appeal Century Centre strenuously presses the contention that the Notes were unenforceable because of Old Sunbelt's misrepresentations by means of which Old Sunbelt deceived Century Centre as to the debt service and retained effective control of Century Centre because of Century Centre's dependence on its help. The difficult

with this position is the doctrine established in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), as reinforced in *Langley v. FDIC*, 484 U.S. 86 (1987).

D'Oench, Duhme held that the maker of a note could not present as a defense to its enforcement a secret agreement between the note's maker and the lending bank when the bank had been taken over by the federal insurer. *D'Oench, Duhme*, 315 U.S. at 460. It is this rule as explained by *Langley* that controls here, even though *Langley* itself is addressed to a statute that does not apply here. The statute is the Federal Deposit Insurance Act of 1950, 12 U.S.C. § 1823(e), which provides: "No agreement which tends to diminish or defeat the right, title or interests of the Corporation [the FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the Corporation," unless certain conditions are met. The conditions are that the agreement is in writing, has been executed by the bank and the obligor at the time of the acquisition of the asset by the bank; was approved by the bank's directors or loan committee, with the approval reflected in their minutes; and has been continuously an official record of the bank. Interpreting this statute, *Langley* held that fraudulent promises inducing the borrower's execution of a note to a bank fall within the meaning of "agreement" and consequently cannot be used as a defense by the borrower against the FDIC. *Langley v. FDIC*, 484 U.S. 86, 92-93 (1987).

The statute, § 1823(e), only applies to assets that the FDIC acquires "either as security for a loan or by purchase or as receiver of an insured depository institution." The FDIC has acquired the assets of FSLIC not as its own

funds but as their manager. FIRREA, 103 Stat. 183, 253 (1989). These funds have not been acquired by purchase nor as a security, nor have they been acquired by the FDIC being the "receiver" of an insured depository institution. Consequently, 12 U.S.C. § 1823(e) does not apply in this case.

Nevertheless, the dicta of *Langley* interpreting *D'Oench, Duhme* are controlling here. For the same reason that fraudulent promises were held not to be a defense against § 1823 in *Langley*, the misrepresentations of Old Sunbelt are not a defense in the present case. *D'Oench* is intended to protect the federal insurer "in its various functions." *D'Oench*, 315 U.S. at 461. If Old Sunbelt did make fraudulent promises through Century Centre, there would be no way the bank examiners could detect the fraud from examination of the loan file and the Notes. The bank examiners would assume that the Notes were assets of the bank. The bank examiners could not know that the Notes were subject to conditions they could not know. Such a situation would effectively deceive the examiners and deny the federal insurer the protection it must receive. "We cannot condone a transaction with the capacity to deceive the banking regulators." *FSLIC v. Gemini Management*, 921 F.2d 241, 245 (9th Cir. 1990).

Century Centre contends that it is eligible for the "innocent borrower" exception to *D'Oench*, first articulated by this court in *FDIC v. Meo*, 505 F.2d 790, 792 (9th Cir. 1974). The *Meo* exception must be read in light of the general policy of the *D'Oench* doctrine, which "favors the interests of depositors and creditors of a failed bank, who cannot protect themselves . . . over the interests of borrowers, who can." *FDIC v. McCullough*, 911 F.2d 593, 600

(11th Cir. 1990). *Meo* is properly invoked only by borrowers who are "innocent of any wrongdoing or negligence." *Meo*, 515 F.2d at 793. Century Centre does not qualify for the *Meo* exception, since it could have investigated the financial background of Old Sunbelt before signing the loan documents. Since Century Centre did not do so, it lent itself to a scheme or arrangement likely to deceive the government regulators and to injure Old Sunbelt's creditors.

Century Centre asserts that the Notes were equity and should be so classified. Old Sunbelt, it asserts, was not its creditor but its co-owner. *D'Oench, Duhme*, it suggests, does not apply in a situation where, in essence, a bank has been dealing with itself. A mere department or extension of Old Sunbelt could not be treated as a borrower; neither, Century Centre contends, can it.

The difficulty with this argument is that Century Centre has offered no evidence to back up its assertions. Its key declarant was Katz, who makes clear that he and Associates were not mere nominees for Old Sunbelt. They were independent actors, who put real money into Century Centre. Even if Old Sunbelt retained equity in Century Centre the general partner was Century Centre ARP, which in terms of equity had "a controlling interest." The control that Old Sunbelt exercised, according to Katz's declaration, was that of a creditor over a needy and subservient debtor.

According to Katz's own declaration, the restructuring of August 29, 1986 was "approved" by Old Sunbelt's independent auditors – an approval that Katz's declaration admits would not have been given unless there was

an equity interest in Century Centre distinct from Old Sunbelt's interest. Although Katz now says that he believes that Old Sunbelt "had the undisclosed intent of using ARP Century Centre and Associates as its pawns," There is not even a whisper in Katz's declaration that ARP Century Centre, as the general partner of Century Centre, was coerced into executing the Notes. Consequently, no material issue of fact was raised as to coercion in the execution of the Notes and the hypothetical possibility that this case might be distinguished from the wide variety ruled by *D'Onech, Duhme* does not materialize.

No material fact is in dispute. Summary judgment was in order.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: CENTURY CENTRE PARTNERS, LTD., Debtor.	CASE NO. CV 90-4929 JGD MEMORANDUM OPINION (Filed Feb. 19, 1991)
CENTURY CENTRE PARTNERS, LTD., Appellant, v. THE FSLIC RESOLUTION FUND, Appellee.	

On February 11, 1991, the Court heard oral argument in appellant Century Centre Partners' appeal from the Bankruptcy Court's Order granting summary judgment in favor of appellee FSLIC Resolution Fund. After considering the arguments presented at that hearing, those arguments put forth in the written briefs submitted by both parties, and the record of the Bankruptcy Court's proceeding, the Court HEREBY AFFIRMS the Order of the Bankruptcy Court.

The Parties

The debtor-appellant is Century Centre Partners Limited, a Texas limited partnership. Debtor filed a chapter

11 bankruptcy petition on November 21, 1988. Appellee FSLIC Resolution Fund, through its manager the Federal Deposit Insurance Corporation ("FDIC"), is one of the claimants against debtor's bankruptcy estate. The FDIC's claim against the debtor is based on certain notes issued by the debtor to Sunbelt Savings Association of Texas. The FDIC is the ultimate successor to the assets of the failed Sunbelt Savings.

Creation of the FDIC's Claim

In 1984, Sunbelt acquired numerous real properties, including one known as the "Centroplex", located on Century Boulevard near Los Angeles International Airport.[1] Sunbelt formed a wholly-owned subsidiary, Sun Cal, Inc., for the purposes of acquiring the properties. Actual title to the properties was taken by various partnerships, with Sun Cal, Inc. serving as general partner of each partnership.

According to the debtor, Sunbelt's auditors advised it that this indirect ownership of Centroplex would result in financial statement classifications that would threaten Sunbelt's compliance with the FSLIC's minimum capital requirements. In an alleged attempt to address this undercapitalization problem, the stock of Sun Cal was sold by Sunbelt to a newly formed California corporation known as May Cal, Inc. This new corporation was wholly owned by two Sunbelt officers, Stanley Castleton and William Dobrowolski. Debtor alleges that all of the

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[1] Centoplex consists of three office buildings, a vacant lot, and a Hilton Hotel.

financing used by May Cal to purchase the Sun Cal stock was provided by Sunbelt and secured by the stock of May Cal. Sunbelt's auditors subsequently advised Sunbelt that this transaction was a sham and would not be effective to remedy the undercapitalization problem.

Therefore, in March, 1986, Centroplex was transferred to debtor Century Centre Partners Limited. Debtor was wholly owned by Sun Cal, with only Castleton and Dobrowolski as limited partners. Debtor paid for the property with a promissory note for the principal sum of $236,718,866.[2] The note was secured by a trust deed on the entire Centroplex property. But Sunbelt's auditors did not view this transfer as an arm's length transaction that would remedy Sunbelt's continuing undercapitalization problem. Therefore, debtor alleges that a reorganization was designed to bring in outside investors. The alleged purpose of this move was to allow Sunbelt to classify its interest in Centroplex as a loan instead of an equity investment.

In the reorganization, American Residential Properties, Inc. ("ARP") entered the scene. On August 29, 1986, ARP, Sun Cal, and the debtor entered into an Agreement for Reorganization and Recapitalization of Century Centre Partners Limited. Also on August 29, 1986 Sunbelt, the debtor, and ARP executed a Restructured Debt Agreement, setting out, *inter alia*, amendments to the promissory note originally created at the time of the transfer of the Centroplex to debtor.

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[2] The FDIC now contends that the principal amount owed to it by the debtor is approximately $160 million, making the FDIC the debtor's largest creditor.

Subsequent to its entry into the transaction, ARP syndicated a limited partnership interest in the debtor to Century Centre Associates Limited, allegedly based upon financial information concerning the operations of the Centroplex which was provided by Sunbelt to ARP. Appellant claims that the financial information provided by Sunbelt was false, causing debtor to be unable to service any of the debt secured by the Centroplex. As a result, debtor was at the mercy of Sunbelt to service the secured debt so that the property would not be foreclosed. Debtor alleges that its necessary subservience to Sunbelt's will, in an attempt to avoid foreclosure, enabled Sunbelt to maintain effective control over the property and its operation.

On August 19, 1988, the FSLIC was appointed receiver for Sunbelt. All of the assets of Sunbelt were immediately transferred to an entity created by the FSLIC to receive such assets (sometimes referred to as "New Sunbelt"). On August 1, 1989, the FSLIC Resolution Fund was created to liquidate the asserts of FSLIC regulated institutions which were closed prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). Under this Act, the FDIC became the manager of the FSLIC Resolution Fund. Accordingly, the various notes and deeds of trust which are the subject of this action were transferred to the FDIC's control.

Ruling of the Bankruptcy Court

The FDIC, as successor in interest to Sunbelt, inherited a claim against the bankrupt's estate as a result of

Sunbelt's loans to, and security interests in the property of, the debtor. However, on March 26, 1990, the debtor filed an adversary complaint with the bankruptcy court regarding the FDIC's claims. Debtor's complaint contained four related claims for relief.

First, debtor contended that the FDIC's claims were actually equity investments made in Centroplex by Sunbelt, the FDIC's predecessor in interest. This equity investment theory was based on Sunbelt's alleged exercise of dominion and control over the debtor which gave Sunbelt the power to structure the transaction as debt rather than equity, giving Sunbelt's investment priority over that of unsubordinated creditors of the debtor. Based on this theory, debtor asked the bankruptcy court to reclassify the FDIC's claims as equity interests.

Second, the debtor asked for equitable subordination of the FDIC's claims pursuant to 11 U.S.C. §510(c). Debtor argued that subordination of the FDIC's claims to those of other claimants flowed from the reclassification sought in the first claim for relief.

The third claim for relief requested that the bankruptcy court order the FDIC to turn over to the debtor's estate the payments made by the debtor to New Sunbelt/FSLIC Resolution Fund by way of "adequate protection" of the FDIC's alleged cash collateral in the net rental revenues generated by the debtor's real properties. This relief also flows from the first request for reclassification of the FDIC's interest as equity instead of debt.

Fourth, debtor sought relief for breach of the covenant of good faith and fair dealing and breach of fiduciary duty. This claim related to the post-bankruptcy

conduct of the FDIC. This claim essentially alleged that the FDIC conducted itself in bad faith and with the improper motive of extracting vengeance from the debtor and its equity holders, even though the course of action taken by the FDIC was not in its own best interests.

On or about May 18, 1990, the FDIC filed a motion for judgment on the pleadings, or in the alternative, summary judgment. On July 16, 1990, the bankruptcy court entered summary judgment in favor of the FDIC as to debtor's claims for relief one, two, and three. That court's conclusion of law 4. states that, "debtor's first, second and third claims for relief are barred by virtue of the *D'Oench, Duhme* doctrine." Conclusion of law 5. states, "with regard to the fourth claim for relief, the FDIC has no fiduciary duty or derivative duty of good faith and fair dealing to the Debtor by virtue of Old Sunbelt's conduct." But conclusion of law 6. states, "with regard to the fourth claim for relief, the Court finds that a material issue of fact remains as to whether a settlement agreement has been reached between the debtor and the FDIC."

Debtor-appellant Century Centre Partners Limited now appeals from the final order granting summary judgment in favor of the FDIC on the First, Second, and Third Claims for Relief entered by the United States Bankruptcy Court for the Central District of California. The appeal was filed on October 9, 1990

Basis for Appellate Jurisdiction

This Court has jurisdiction to hear an appeal from a final judgment of the Bankruptcy Court for the Central

District of California pursuant to 28 U.S.C. §158(a). Appellee FSLIC Resolution Fund objected to the jurisdiction of the Ninth Circuit Bankruptcy Appellate Panel, and this case is hence properly before this Court. *See* 28 U.S.C. §158(b).

Standard of Review

The bankruptcy court's findings of fact are to be reviewed under a "clearly erroneous" standard. Bankr. Rule 8013. However, conclusions of law are subject to *de novo* review. *Wien Air Alaska, Inc. v. Bachner*, 865 F.2d 1106, 1108 (9th Cir. 1989).

Summary Judgment Standard

The Supreme Court has held that to prevail upon a summary judgment motion, no evidence must exist upon which a jury could reasonably find for the opposing party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). In considering a summary judgment motion, a court must consider the evidence in the light most favorable to the opposing party. *Id.*, 106 S.Ct. at 2513.

Once the party moving for summary judgment has supported its burden of demonstrating that there is no genuine dispute as to any material fact, the party opposing the motion must present evidence demonstrating the existence of a triable issue of fact. Pursuant to Fed. R. Civ. P. 56(e), "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings . . . [T]he adverse party's response must set forth

specific facts showing that there is a genuine issue for trial." Where the nonmoving party bears the burden of proof at trial on a dispositive issue, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by his or her own affidavits, or by depositions, answers to interrogatories and admissions, designate issues of fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Discussion

The essence of appellant-debtor's argument about the validity of the FDIC's claims against its assets is that Sunbelt somehow, through financial misrepresentations, defrauded debtor in the original inducement to contract for the Centroplex loans. From there, because debtor relied on such financial misrepresentations to calculate the feasibility of debt service on the Centroplex loans, the debtor was unable to make debt service on the loans and necessarily became beholden to Sunbelt in order to avoid foreclosure of the security interests underlying the loans. As a result of these events, debtor argued to the bankruptcy court that the Sunbelt interest in the Centroplex loans was really an equity investment. Hence, debtor's underlying complaint seeks equitable subordination of the FDIC's interest (i.e. that the FDIC be given less priority than all of debtor's other creditors).

A critical distinction relevant to the Court's review is that the Bankruptcy Court did not reach the issue of debt versus equity treatment of Sunbelt's investment. Instead, the Bankruptcy Court essentially held that regardless of the merits of the debtor's allegations of fraud and the

overburdening of its will by Sunbelt, the debtor's claims were not of a type that could be enforced against the FDIC as a successor in interest to a failed financial institution. The Bankruptcy court found that the line of cases beginning with *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 62 S.Ct. 676, 86 L. Ed. 956 (1942), precluded the entertainment of debtor's claims against the FDIC. In other words, the Bankruptcy Court ruled that debtor was estopped from raising its fraud-oriented, form-over-substance theories against the FDIC. Accordingly, the pivotal question on appeal is whether the Bankruptcy Court erred in making its Findings of Fact and Conclusions of Law which led to the application of the *D'Oench, Duhme* doctrine to this case.[3]

The Ninth Circuit recently summarized the *D'Oench, Duhme* case as follows:

> "In *D'Oench, Duhme*, a brokerage firm executed a note in favor of a bank for no consideration, and with the understanding that the note would never be called for payment. The firm had previously sold the bank a quantity of bonds, which later defaulted. To cover the loss, the bank requested that the firm execute a demand note, payable to the bank, for the amount due on the bonds. The bank then carried the note, instead of the past due bonds, as an asset on its books. The firm and the bank agreed

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[3] 12 U.S.C. § 1823(e) is essentially the statutory analog of the *D'Oench Duhme* doctrine. Courts often make little distinction between the two. For example, the Ninth Circuit has stated, "§1823(e) was meant to offer as much protection as the common law rule in *D'Oench*." *FSLIC v. Gemini Management*, 90 D.A.R. 14538, 1990 U.S. App. Lexis 21946 (9th Cir. 1990).

> orally that the proceeds of the bonds would be credited to the note, and the note would never be called for payment.
>
> "The bank later failed, and the FDIC acquired the note as part of the collateral securing a loan to the bank. When the FDIC brought suit on the note, the defendant claimed the oral agreement with the bank relieved them from liability. The Supreme Court held the defendant 'was responsible for the creation of the false status of the note in the hands of the bank. It therefore cannot be heard to assert the federal policy to protect [the FDIC] against such fraudulent practices should not bar its defense to the note.' *Id.*, 315 U.S. at 461."

FSLIC v. Gemini Management, 90 D.A.R. 14538, 14539, 1990 U.S. App. Lexis 21946 (9th Cir. 1990).

Here, debtor-appellant's chief theory on appeal is that it did not agree to any side agreement with Sunbelt, nor did it lend itself to any Sunbelt scheme, but instead was itself defrauded and ultimately financially overborne by the actions of Sunbelt. In other words, debtor appears to argue that it was not responsible for those Sunbelt actions which it alleges support treatment of the Centroplex loans as equity investments. Hence, it argues that the estoppel effect of *D'Oench, Duhme* should not apply to prevent its complaint. However, this argument is without merit.[4]

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[4] Debtor also argues that this Court should reverse the Bankruptcy Court on grounds that certain of its findings of fact were clearly erroneous. However, the Court finds that this argument is also without merit. Specifically, the debtor argues that

First, the *D'Oench, Duhme* doctrine has repeatedly been applied to protect the FDIC from claims or affirmative defenses based on fraud. *E.g., Langley v. FDIC,* 484 U.S. 86, 108 S.Ct. 396, 98 L.Ed.2d 340 (1987) (debtor claimed bank misrepresented the size of property and the extent of outstanding mineral leases thereon); *Bell & Murphy & Assoc. v. Interfirst Bank Gateway,* 894 F.2d 750 (5th Cir. 1990) (Debtor claimed that bank had fraudulently induced it to enter into a refinancing agreement); *FSLIC v. Murray,* 853 F.2d 1251, 1255 (5th Cir. 1988) (debtor claimed that lender, *inter alia,* misrepresented the value of collateral property and that a subsidiary had an equity interest in the property); *FDIC v. Bell,* 892 F.2d 64 (10th Cir. 1989) (debtor claimed that lender had misrepresented value of property and had fraudulently induced purchase). Moreover, *Langley v. FDIC* was unequivocal in its holding that fraud in the inducement did not prevent application of the *D'Oench Duhme* doctrine or § 1823:

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the Bankruptcy Court had simply "no evidence" before it upon which to find that "debtor had knowledge of and acquiesced in the conduct of Old Sunbelt as alleged in Debtor's complaint" (Finding of Fact L.), or that "the debtor was not coerced by Old Sunbelt into executing the Loan Documents" (Finding of Fact M.).

To hold a finding of fact is clearly erroneous, an appellate court must be left with the definite and firm conviction that a mistake has been committed. *U.S. v. U.S. Gypsum,* 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). Here, however, the evidence put forward by debtor's own declarant provides adequate basis for each of Bankruptcy Court findings. The declaration of Aaron Katz confirms that the debtor willingly and knowingly signed the loan documents, including the notes in question. *See* Katz Decl., pp. 44-46, attached as Ex. B. to Debtor's Opposition to FDIC's Motion for Summary Judgment.

"Neither fraud in the inducement nor knowledge by the FDIC is relevant to the section's application." 108 S.Ct. at 402.

Second, the Bankruptcy Court did not err in holding that this case satisfies the fundamental tests for application of the *D'Oench, Duhme* doctrine. The Bankruptcy Court concluded that debtor's involvement in these events meant that it had lent itself to a scheme or arrangement likely to mislead banking authorities. *See* Conclusion of Law 3. Based upon the standards enunciated in *Langley,* and recently confirmed by the Ninth Circuit, the Bankruptcy Court did not err in reaching this conclusion.

In defining the appropriate context in which to apply §1823, the *Langley* court referred back to the common law principles of *D'Oench, Duhme* and held that the proper view was that "when the maker 'lent himself to a scheme or arrangement whereby the banking authority . . . was likely to be misled,' that scheme or arrangement could no [sic] be the basis for a defense against the FDIC." 108 S.Ct. at 402. Moreover, in *Gemini Management,* the Ninth Circuit emphasized the following language from D'Oench, Duhme:

> "The test is whether the note was designed to deceive the creditors or the public authority, or would tend to have that effect. It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which [the FDIC] relied in insuring the bank was or was likely to me misled. *D'Oench, Duhme,* 315 U.S. at 460."

90 D.A.R. at 14539. Hence, there can be no dispute as to the appropriate trigger for application of the *D'Oench, Duhme* doctrine.

Expanding on the basic test, the *Langley* court shed certain light on what it means for one to lend itself to a scheme or arrangement:

> "Certainly, one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities, whether the condition consists of performance of a counterpromise (as in *D'Oench, Duhme*) or of the truthfulness of a warranted fact."

108 S.Ct. at 402.

Applying this approach here, debtor here signed an unqualified note and related agreements that debtor now claims contained fraudulent representations. According to *Langley*, the fraudulent nature of certain representations, or "the truthfulness of warranted facts", are unwritten and unrecorded conditions. Hence, by signing an unqualified note containing such unrecorded conditions, even though not necessarily responsible for any untruthfulness of such conditions, under *Langley* the debtor must be held to have lend itself to a scheme or arrangement that is likely to mislead banking authorities.

As *Gemini Managements* made clear, the test in this circuit for application of *D'Oench, Duhme* is not whether the debtor entered into any side agreement with the lender. Rather the proper inquiry is whether the debtor lent itself to a scheme or arrangement likely to mislead

banking authorities. *Gemini Management*, 90 D.A.R. at 14539. Therefore, since the Court has determined that the Bankruptcy Court did not err in concluding that debtor did in fact lend itself to the scheme or arrangement allegedly perpetuated by Sunbelt, the Court holds that the Bankruptcy Court similarly did not err in determining that the *D'Oench, Duhme* doctrine applies to he instant case. Hence, all debtor's claims against the FDIC on the basis of the alleged fraud by Sunbelt are estopped. Accordingly, summary judgment in favor of appellee FSLIC Resolution Fund must be AFFIRMED.

IT IS SO ORDERED.

Dated: Feb. 15, 1991

/s/ John G. Davies
JOHN G. DAVIES
United States District Judge.

APPENDIX C

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UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re CENTURY CENTRE PARTNERS LTD., a Texas Limited Partnership, Debtor.	Case No. LA 88-24462 RR Adv. No. LA 90-0532 RR CHAPTER 11 [PROPOSED] FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF SUMMARY JUDGMENT IN FAVOR OF THE FDIC ON THE FIRST, SECOND AND THIRD CLAIMS FOR RELIEF Date: June 18, 1990 Time: 2:00 p.m. Courtroom: 1 201 North Figueroa St. Los Angeles, CA 90012 (Filed Jul 9, 1990)
CENTURY CENTRE PARTNERS, LTD., a Texas Limited Partnership, Plaintiff, vs. THE FSLIC RESOLUTION FUND, Defendant.	

The motion of the Federal Deposit Insurance Corporation ("FDIC"), as manager of the FSLIC Resolution Fund, for judgment on the pleadings or, in the alternative, for summary judgment, came on regularly for hearing before this Court on June 18, 1990 at 2:00 p.m. Kathleen M. White and Richard F. Broude of White & Case appeared on behalf of the FDIC; Jean Morris appeared on behalf of the Debtor, Century Centre Partners, Ltd.

After considering the moving and opposition papers, the argument of counsel and all evidence and other matters presented to the Court, the Court makes the following findings. To the extent conclusions of law are incorporated into the findings of fact, they should be considered to be both legal conclusions and factual findings.

I.

FACTUAL FINDINGS

A. Debtor is a Chapter 11 Debtor herein having filed a petition for relief under Chapter 11 of Title 11 of the United States Code on November 21, 1988.

B. Defendant FDIC, as Manager of the FSLIC Resolution Fund, is the beneficial owner and holder of certain promissory notes under which the Debtor is the obligee ("Notes"), which Notes are secured by property of the Debtor's estate. The Notes held by the FDIC were previously held by Sunbelt Savings Association of Texas ("Old Sunbelt"), which was declared insolvent and put into receivership by the Federal Home Loan Bank Board on

August 19, 1988. The Federal Savings & Loan Insurance Corporation ("FSLIC"), as receiver, immediately thereafter took control of substantially all of the assets of Old Sunbelt, including the Notes, FSLIC, as receiver, then assigned the Notes to a newly formed entity, Sunbelt Savings FSB ("New Sunbelt"), which in turn assigned these Notes to FSLIC, in its corporate capacity. Subsequently, the Notes were assigned to the Fund by operation of law pursuant to the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").

C. The Notes are secured by an All-Inclusive Deed of Trust ("AITD") encumbering (a) an eight-story concrete frame office building and four-story concrete frame office building ("Building 1" and "Building 2" respectively); (b) a unimproved lot (the "Vacant Lot"); (c) an eight-story concrete frame office building ("Building 7"); and (d) the Los Angeles Airport Hilton Hotel and Towers (the "Hotel").

D. The FDIC's Notes also include (a) a note secured by a first-priority deed of trust on Building 7; (b) a note secured by a second-priority deed of trust on Building 1 and Building 2, (c) a note secured by a first-priority deed of trust on the Vacant Lot and (d) a note secured by a second-priority deed of trust on the Hotel which has been voided pursuant to 11 USC § 506(d), (collectively, the "Acquired Notes"). The Acquired Notes reflect loans made by lending institutions other than Old Sunbelt, which Notes were purchased by Old Sunbelt prior to the filing of the Debtor's petition.

E. Debtor executed the Notes and related agreements and deeds of trust securing the obligations under

the Notes (collectively, the "Loan Documents"), which include:

(a) an amendment to Loan Agreement between Old Sunbelt and Debtor, dated August 29, 1986;

(b) a replacement all-inclusive promissory note in the original principal sum of $242,747,175 executed by Debtor and made payable to Old Sunbelt, dated August 29, 1986;

(c) an amended and restated construction loan agreement between Old Sunbelt and Debtor dated August 29, 1986;

(d) a replacement construction note in the original principal sum of $25,357,235 executed by Debtor and made payable to Old Sunbelt, dated August 29, 1986;

(e) a revolving loan agreement between Old Sunbelt and Debtor dated August 29, 1986;

(f) a revolving promissory note in the original principal sum of $10,000,000 executed by Debtor and made payable to Old Sunbelt, dated August 29, 1986; and

(g) a pledge agreement dated August 29, 1986, regarding certificates of deposit executed by Debtor in favor of Old Sunbelt as collateral for the above-described revolving note, and a modification to the all-inclusive deed of trust and collateral assignment of management agreement executed by Debtor in favor of Old Sunbelt, modifying an all-inclusive deed of trust dated March 19, 1986 and securing the replacement all-inclusive deed of trust and the replacement construction note.

F. The Debtor executed the Loan Documents identified above to record and secure its indebtedness to Old Sunbelt.

G. On August 19, 1988, Old Sunbelt was closed and FSLIC, as receiver, took control of substantially all of its assets, including the Notes.

H. On November 21, 1988, Debtor filed its petition under Chapter 11 of Title 11 of the United States Code.

I. Proofs of Claim have been timely filed in this case reflecting the Debtor's obligations under the Notes.

J. On March 26, 1990, Debtor filed this adversary complaint against the FDIC asserting four claims for relief:

(1) objecting to the FDIC's claims under 11 U.S.C. § 502 and requesting reclassification of the FDIC's claims to interests;

(2) seeking equitable subordination of the FDIC's claims under 11 U.S.C. § 510(c) and transference of the FDIC's liens to the Debtor's estate;

(3) seeking turnover of "adequate protection" payments made to the FDIC and its predecessors during the pendency of the bankruptcy case; and

(4) seeking damages for breach of the covenant of good faith and fair dealing and breach of fiduciary duty.

K. Debtor's first, second and third claims for relief are based on alleged misrepresentations made by Old Sunbelt in conjunction with the execution of the Loan

Documents, as well as Old Sunbelt's alleged exercise of "domination and control" over the Debtor after execution of the Loan Documents.

L. Debtor had knowledge of and acquiesced in the conduct of Old Sunbelt as alleged in Debtor's Complaint.

M. The Debtor was not coerced by Old Sunbelt into executing the Loan Documents.

II.

CONCLUSIONS OF LAW

To the extent factual findings are incorporated into legal conclusions, they should be considered to be both factual findings and legal conclusions. From the foregoing facts, the Court determines that:

1. The Court has jurisdiction of this proceeding pursuant to 28 U.S.C. §1334(b) and 28 U.S.C. 157(a) and (b). The adversary proceeding is brought pursuant to 11 U.S.C. §§502 and 510(c).

2. The alleged misrepresentations and conduct of Old Sunbelt constitute an "agreement" within the meaning of *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942) and *Langley v. FDIC*, 484 U.S. 86 (1987).

3. Debtor lent itself to a scheme or arrangement likely to mislead banking authorities.

4. Debtor's first, second and third claims for relief are barred by virtue of the *D'Oench, Duhme* doctrine.

5. With regard to the fourth claim for relief, the FDIC has no fiduciary duty or derivative duty of good

faith and fair dealing to the Debtor by virtue of Old Sunbelt's conduct.

6. With regard to the fourth claim for relief, the Court finds that a material issue of fact remains as to whether a settlement agreement had been reached between the Debtor and the FDIC.

7. Based on the foregoing conclusions, the Court does not reach the issues of the retroactive application of 12 U.S.C. § 1823(e) or the application of the federal holder-in-due-course doctrine, and makes no findings or conclusions as to these issues.

Dated: July 9, 1990

/s/ Robin Riblet
THE HONORABLE ROBIN L. RIBLET
UNITED STATES BANKRUPTCY JUDGE

Submitted by:
WHITE & CASE

By /s/ Kathleen M. White
Kathleen M. White
Attorneys for Defendant, FDIC, as
Manager of the FSLIC Resolution Fund

APPENDIX D

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UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

In re CENTURY CENTRE PARTNERS LTD., a Texas Limited Partnership, Debtor.	Case No. LA 88-24462 RR Adv. No. LA 90-0532 RR CHAPTER 11 ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE FDIC ON THE FIRST,SECOND AND THIRD CLAIMS FOR RELIEF DATE: June 18, 1990 Time: 2:00 p.m. Courtroom: 1 201 North Figureroa St. Los Angeles, CA 90012 (filed July 9, 1990)
CENTURY CENTRE PARTNERS, LTD., A Texas Limited Partnership, Plaintiff, vs. THE FSLIC RESOLUTION FUND, Defendant.	

The motion of the Federal Deposit Insurance Corporation ("FDIC"), as manager of the FSLIC Resolution Fund, for judgment on the pleadings or, in the alternative, for summary judgment, came on regularly for hearing before this Court on June 18, 1990 at 2:00 p.m. Kathleen M. White and Richard F. Broude of White & Case appeared on behalf of the FDIC; Jean Morris appeared on behalf of the Debtor, Century Centre Partners, Ltd.

After considering the moving and opposition papers, the argument of counsel and all evidence and other matters presented to the Court,

IT IS HEREBY ORDERED that the FDIC's motion for summary judgment is *GRANTED* as to the first, second and third claims for relief in the complaint.

IT IS HEREBY FURTHER ORDERED that the motion for summary judgment as to the fourth claim for relief is *DENIED* in that there are material issues of fact that remain to be litigated.

Dated: July 9, 1990

/s/ Robin L. Riblet
THE HONORABLE ROBIN L. RIBLET
UNITED STATES BANKRUPTCY JUDGE

Submitted by:
WHITE & CASE

By /s/ Kathleen M. White
Kathleen M. White
Attorneys for Defendant, FDIC, as
Manager of the FSLIC Resolution Fund

DECLARATION OF SERVICE

I am over the age of eighteen years and not a party to the within action. I am employed in the office of a member of the bar of this court, at whose direction the within service was made. My business address is White & Case, 333 South Hope Street, Los Angeles, California 90071.

On June 25, 1990, I served the following pleading:

ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF THE FDIC ON THE FIRST, SECOND AND THIRD CLAIMS FOR RELIEF

On the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, with first-class postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

The above-described pleading also was transmitted to the aforementioned parties in the manner described below as indicated by a check mark.

___ By air courier service, for next business-day delivery;

_X_ By messenger service, for same-day delivery by hand;

___ By telecopy, for immediate receipt.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on June 25, 1990 at Los Angeles, California.

/s/ Leslie O'Dowd
Declarant LESLIE O'DOWD

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